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82-892

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

PATRICK W. HANIGAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. _____

(Ninth Circuit No. 79-1823)

PETITION FOR CERTIORARI
TO REVIEW DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAYNES & ROCKAFELLOW, P.C.
By: Alex A. Gaynes
2438 East Broadway
Tucson, Arizona 85719

Date of Mailing: November 26, 1982

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

PATRICK W. HANIGAN,	)	
	)	
Petitioner,	)	No._____
	)	
vs.	)	
	)	(Ninth Circuit
UNITED STATES OF AMERICA,	)	No. 79-1823)
	)	
Respondent.	)	
	)	

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QUESTION PRESENTED

The question presented is: How can Patrick Hanigan have knowingly and wilfully obstructed, delayed, affected, and attempted to obstruct, delay and affect commerce by virtue of an alleged robbery of $40.00, a keyring, and a dollar bill, respectively, from three illegal Mexican aliens, traveling from Mexico towards Elfrida, Arizona in hopes of possibly receiving work at an agricultural business in the State of Arizona?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Patrick Hanigan, Petitioner herein, prays that a Writ of Certiorari issue to review the Opinion of the Ninth Circuit dated July 19, 1982, and the Order of the Ninth Circuit, denying Petitioner's Motion for Rehearing and Suggestion for Rehearing en banc, dated September 22, 1982.

OPINIONS OF THE COURTS BELOW

The Opinion of the United States District Court for the District of Arizona (Bilby, D.J.) is reproduced in Appendix A. This Order dealt with essential issues to be raised in this Petition. The Order was dated December 14, 1979. The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed is reproduced in Appendix B. The denial of Petitioner's Motion for Rehearing and Suggestion for Rehearing en banc is reproduced in Appendix C.

STATEMENT OF THE CASE

Patrick Hanigan and his brother Thomas Hanigan were indicted and charged with three counts of violating the Hobbs Act, found at 18 U.S.C. §1951. At a joint trial in front of two juries in Phoenix, Arizona, Thomas Hanigan was acquitted and Patrick Hanigan was convicted.

The Court of Appeals upheld Mr. Hanigan's conviction on each of the three counts.

Mr. Hanigan, through his attorneys, filed a Petition for Rehearing and Suggestion for Rehearing en banc.

The Petition for Rehearing was denied on September 22, 1982. The decision denying Mr. Hanigan's Petition for Rehearing is the last substantive matter pending in front of the Ninth Circuit.

Subsequently, the Ninth Circuit Court granted until November 30, 1982, for Mr. Hanigan to file a Petition for a Writ of Certiorari prior to the issuance of the Ninth Circuit Mandate. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

QUESTIONS FOR REVIEW

Patrick Hanigan is raising the issue of the scope of Federal Government power and its relationship to our system of government. The question is presented is: How can Patrick Hanigan have knowingly and wilfully obstructed, delayed, affected, and attempted to obstruct, delay and affect commerce by virtue of an alleged robbery of $40.00, a keyring, and a dollar bill, respectively, from three illegal Mexican aliens, traveling from Mexico towards Elfrida, Arizona in

hopes of possibly receiving work at an agricultural business in the State of Arizona?

It is submitted that there is no jurisdiction and was no jurisdiction, and any act at creating federal jurisdiction was and is impermissible under the Constitution.

STATEMENT OF THE CASE AND ARGUMENT

I. Introduction.

The United States Court of Appeals for the Ninth Circuit has sanctioned a reading of the Hobbs Act, found at 18 U.S.C. §1951, which drastically expands the interpretation of the Hobbs Act beyond that of every case ever decided anywhere in America under that Act. The Ninth Circuit has departed from all prior decisional law, and has acted contrarily

to the position espoused by the Seventh Circuit in United States v. Mattson, 671 F.2d 1020 (7th Cir. 1982), by ruling that by virtue of allegedly robbing $40.00, a keyring, and a dollar bill, respectively from three Mexican aliens traveling from Mexico towards Elfrida, Arizona in the hopes of obtaining work at an agricultural business in the State of Arizona, that Mr. Hanigan knowingly and wilfully obstructed, delayed, affected, and attempted to obstruct, delay and affect commerce.

Never before has there been a criminal prosecution under the Hobbs Act wherein the alleged victims were aliens, where the alleged victims were traveling on private property, where the alleged victims had no right to travel, where the alleged victims were trespassing, where the amounts involved were insig-

nificant, where the effects on interstate commerce were so tenuous at best, and linked only to possible consequences in the future, and where the government has attempted to clothe a "civil rights" prosecution under the guise of the Hobbs Act. Nor has there ever been a dual prosecution sanctioned, where the dual prosecution came as the result of political pressure, in an attempt to punish Patrick and his brother Thomas for being successful in a protracted Arizona court jury trial.

Yet, in this criminal case, with no prior basis in decisional law, the District Judge first, and now the Ninth Circuit have enlarged the scope of the Hobbs Act and have retroactively found that a cause of action existed, where at the time of the alleged incident under discussion (August 18, 1976), no such cause of action existed.

The Hanigans were charged with a violation of the Hobbs Act, after having been tried in the Superior Court of the State of Arizona and acquitted of 26 counts ranging from kidnapping and aggravated assault to robbery. After a two-year delay, they were charged once again by the federal government, this time under the guise of the Hobbs Act.

It is submitted that the Ninth Circuit's erroneous expansion of the Hobbs Act conflicts with all prior law and operates as ex post facto application of the statute in violation of due process.

In addition, the Ninth Circuit Opinion misconstrues two separate clauses of the Constitution.

In its Opinion, the Ninth Circuit Court notes that it "is anomalous to maintain that Congress could make undocumented entry into the United States...

unlawful, while at the same time maintaining that the same movement of persons is not 'commerce over which the United States has jurisdiction'".

The Ninth Circuit simply erred. The authority to allow entry into the United States is conferred upon Congress by one section of the United States Constitution, and the power to regulate commerce is afforded through another portion of the Constitution.

In other words, though entry into the United States of foreign nationals could conceivably be regarded as having an impact on United States commercial interests, the commerce power does not extend to this area. The immigration and naturalization clause of the Constitution extends the jurisdiction of Congress to this area. The commerce clause is separate. It must be separate if it is to retain its vitality.

The commerce clause is contained in Article 1, Sec. 8, Clause 3 of the Constitution, and the naturalization clause is contained in Article 1, Sec. 8, Clause 4 of the Constitution. The immigration and naturalization act is based on Clause 4 of Article 1, Sec. 8, NOT Article 1, Sec. 8, Clause 3.

While the commerce clause is broad, it cannot be made to destroy or make superfluous other portions of the Constitution.

The reading of the commerce clause by the Ninth Circuit makes every manner of offense a matter of federal concern. Not only is this beyond the resources of Congress, beyond the scope of the designers of the Constitution, and violative of the sacred principle of federalism, but it also adds a dangerous weapon to the arsenal of government.

If the federal government now has the authority to try all robberies with the most attenuated "potential" effects on commerce, then all state robberies are federal offenses. Who will be prosecuted? The weak, the meek, and individuals not part of any active lobbying force. Our law becomes an instrument of injustice rather than justice. The Ninth Circuit failed to grapple with and reach any of these important issues.

The record at trial was devoid of any affect on interstate commerce. The three individual alleged victims were allegedly on their way to seek work with a Mr. Wally Householder of Elfrida, Arizona. Mr. Householder revealed that commerce was not affected:

> "Question. (by Mr. Gaynes) In August of 1976, when Mr. Mata failed to show up and didn't bring

two other people with him, would it be fair to say that these three people not showing up on your farm on August 18, 1976, had absolutely no affect on any part of your business or operation in any conceivable manner; is that a true statement?

"Answer: Yes.

"Q. Would it also be a true statement to state that these three people not showing up on your farm on August 18, 1976, or even August 19, 1976, did not even have any potential impact or affect on any conceivable part of the operation of your business in any conceivable manner?

"A. Yes. "

TR.2079, LL.5-20.

Thus, the person to whom these individuals were allegedly going to work was not affected in any manner by non-appearance. Thus, the government was

unable to prove any arguable affect on interstate commerce.

Two additional witnesses were called by the prosecution to bolster its sagging commerce connection. The first witness, an individual named H. Barry Rose, revealed that he had previously employed one of the three complaining witnesses, but that he did not even own a farm in August of 1976. (TR, Vol. 11, 2043, LL.8-10) Furthermore, none of the complaining witnesses claimed they were on their way to work at Mr. Rose's formerly owned orchard. Another witness, a Mr. Ben Ratliff testified, but none of the complaining witnesses were even on their way to his farm on the day of the incident.

The Ninth Circuit has now sanctioned Hobbs Act use in a case in which there was no affect on commerce. U.S. v.

Culbert, 435 U.S. 371, 98 S. Ct. 1112 55 L. Ed. 2nd 349 (1978), the leading case on the Hobbs Act, does not speak in terms of "reasonably", "probably", or "potentially" affecting commerce. Culbert requires actual affect on commerce. The trial court in the Ninth Circuit relied heavily on Culbert, but erroneously. The lower courts went too far in following the "broad scope" language of the Supreme Court, and disregarded the clear, simple statement that the affect on commerce is "critical".

In addition, the rule in the Ninth Circuit now conflicts with the Seventh Circuit ruling in the case of U.S. v. Mattson, 671 F.2d 1020 (7th Cir. 1982).

II. Reasons for Granting the Writ.

Point 1.

The Ninth Circuit's expansion of the Hobbs Act is without precedent, con-

flicts with all prior case law, is based on a misapprehension of two important clauses of the Constitution, contradicts the rulings of the Seventh Circuit, and the specific congressional intent of the Hobbs Act.

Prior to the Ninth Circuit's decision, there had never been a Hobbs Act case even vaguely resembling this case. The trial judge noted in his Order at the onset of the case, in response to Mr. Hanigan's Motion to Dismiss, that:

> "Both parties have acknowledged this as a case of first impression involving aliens and alleged robbery under the Hobbs Act."

The importance of federal/state concerns are as applicable in this situation as in travel act cases. See Rewis v. U.S., 401 U.S. 808, 91 S. Ct. 1056 (1971). That case recognized that

"an expansive travel act would alter sensitive federal/state relationships, could overextend federal police resources, and might well produce situations in which geographic origin of customers, as a matter of happenstance would transform relatively minor state offenses into federal felonies." 401 U.S. at 812; 91 S. Ct. at 1059.

These concerns are equally applicable to the case at bar. They were the same types of concerns voiced by this court in National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465, 49 L.Ed. 2nd 245 (1976).

Point 2.

The retroactive application by the District Court and the Court of Appeals of its new, expansive interpretation of the Hobbs Act violates due process. The events alleged occurred on August 16, 1976. At that time, this

court had not decided U.S. v. Culbert, 435 U.S. 371 (1978).

Similarly, at the time of the alleged offenses, there is no way that any reasonable human being could assume that the Hobbs Act could apply to the acts under consideration. To expand this statute as it has been done runs afowl of the most fundamental notions of fair play. In Bouie v. City of Columbia, 378 U.S. 347 (1964), Mr. Justice Brennon wrote for this court: "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language, but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language....(a)n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an Ex post Facto law,

such as Article One, Section 10 of the Constitution forbids....if a state legislature is barred by the Ex post Facto clause from passing such a law, it must follow that a State Supreme Court is barred by the due process clause from achieving precisely the same result by judicial construction." 378 U.S. at 352-354.

The Hanigans were charged in 1976, were acquitted in 1977 of all state charges, and were charged in 1979 with violations not even contemplated under the law when the alleged incidents occurred.

Point 3.

The issues raised are serious and important issues which must be grappled with by this court. The Seventh Circuit decided U.S. v. Mattson, 671 F.2d 1020 (1982), a case which is contrary to the ruling of the Ninth Circuit.

In the recently filed case of U.S. v. Boulahanis, 677 F.2d 586 (7th Cir. 1982), this court denied certiorari on November 15, 1982, in case No. 82-263, which left standing a Seventh Circuit decision contrary to that of the Ninth Circuit. That is, the Seventh Circuit enunciated a standard in Hobbs Act cases whereby they differentiated between Hobbs Act cases involving an affect on business versus an affect on individuals. The court in Boulahanis recognized that extortion has a greater effect on interstate commerce when directed at a business than at an individual. This philosophy and interpretation is contrary to the interpretation of the Ninth Circuit.

It is important for this court to straighten out the inconsistencies of the Circuits.

An important thrust of this petition is the extent of governmental authority over its citizens. This issue is important to individuals living in a regulated society and cries for this court's attention.

CONCLUSION

For these reasons, the court should accept the Petition for a Writ of Certiorari and reverse Mr. Hanigan's conviction.

Respectfully submitted.

GAYNES & ROCKAFELLOW, P.C.

By _____

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FILED
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK W. HANIGAN and THOMAS H. HANIGAN, Defendants.	No. CR 79-206-TUC RM ORDER

Defendants allege five grounds in support of their Motion to Dismiss:

1. Pre-indictment delay;
2. Selective prosecution;
3. Violation of petite policy and double jeopardy;
4. Generalized claim of due process violation;
5. Questions of Federal jurisdiction under the Hobbs Act.

PRE-INDICTMENT DELAY

The Court finds insufficient evidence to support a finding of actual prejudice to the

defendants. While one proposed witness has died, her testimony is available from the previous State trial. Furthermore, the defendants have found additional alibi witnesses who did not testify at the previous trial. Lastly, the defendants failed to show any negligence or intentional misconduct on the Government's part.

SELECTIVE PROSECUTION

Both parties have acknowledged this as a case of first impression involving aliens and alleged robbery under the Hobbs Act.

The defendants are unable to point to any other cases involving similar facts where the Government has declined to prosecute; on the contrary, the Government represented that this is the first case of its nature to have been brought to its attention. Under these circumstances, there has been no showing of selective prosecution.

DOUBLE JEOPARDY

The Supreme Court of the United States has repeatedly held that a prosecution of a

Federal crime arising out of the same factual situation which resulted in State prosecution does not constitute double jeopardy. Abbate v. United States, 359 U.S. 187 (1958). Furthermore, the defendants have no standing upon which to predicate a claim that their prosecution violates in some manner the petite policy of the Department of Justice.

GENERALIZED CLAIM OF DUE PROCESS VIOLATION

No specific claims have been made to the Court, and its review of the actions of the United States Attorney's Office, the Federal Grand Jury Transcripts and related matters reveal no violations at this date.

FEDERAL JURISDICTION

The most troublesome aspect of the defendants' Motion is their contention that the Hobbs Act does not extend jurisdiction in the Federal Court over the case in question. Here, it is alleged that three Mexican aliens were traveling from Mexico towards Elfrida, Arizona, in search of work at an agricultural

business in the State of Arizona, and the defendants, by virtue of a robbery by force, thereby knowingly and wilfully obstructed, delayed, affected and attempted to obstruct, delay and affect commerce.

Defendants contend that exercising jurisdiction under these facts would destroy the federal-state balance under the Constitution. This contention was answered by the Supreme Court in United States v. Culbert, 98 S.Ct., 1112, 1117 (1978) when it unanimously (8-0) held:

> "With regard to the concern about disturbing the federal-state balance, moreover, there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law. The legislative debates are replete with statements that the conduct punishable under the Hobbs Act was already punishable under state robbery and extortion statutes. .

> . . Those who opposed the Act argued that it was a grave interference with the rights of the States . . . Congress apparently believed, however, that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce and that the Federal Government had an obligation to do so. . . ." 1/

Neither counsel nor the Court has been able to find a case which is factually similar. However, the courts have repeatedly held the language of the Hobbs Act with reference to commerce is broad ("in any way or degree") and should not be interpreted in a restrictive manner. United States v. Culbert, supra. The Ninth Circuit has held that:

> ". . . only a de minimis effect is necessary . . . and the effect need be only probable or potential not actual." United States v. Phillips, 577 F.2d 495 (9th Cir. 1978)

Likewise, the Third Circuit in United States v. Cerilli, 603 F.2d 415, 424 (3rd Cir. 1979) recently held:

> ". . . It is not necessary that the purpose of the extortion be to affect interstate commerce . . . but only that one of the natural effects thereof be an obstruction of that commerce. . . . (A)ll that is required to bring an extortion within the statute is proof of a reasonably probable effect on commerce, however minimal, as a result of the extortion.
>
> . . . Congress was as much concerned with the threatened impact of the prohibited conduct as with its actual effect. . . ."

1/ As a practical matter, if the Federal Government choses to emply it, the Hobbs Act federalizes the vast majority of extortion and robberies in the country. Whether this should be the policy of the Government is a legislative and executive decision, not a judicial one.

This case approaches the outer reaches of Hobbs Act jurisdiction. Nevertheless, in light of the repeated holdings of the Supreme Court and the Ninth Circuit that the Act is not to be interpreted in a restrictive manner, the defendants' Motion to Dismiss must be denied.

The Clerk of the Court is directed to mail a copy of this Order to all counsel of record.

SO ORDERED this 14th day of December, 1979.

/s/ Richard M. Bilby
Richard M. Bilby
United Stated District Judge

Filed Jul 19, 1982
Philip B. Winberry
Clerk, U.S. Court
of Appeal

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 81-1262
	D.C. #CR79-206-1
Plaintiff-Appellee,	
v.	OPINION
PATRICK W. HANIGAN,	
Defendant-Appellant.	

Appeal from the United States District Court for the District of Arizona

Richard M. Bilby, District Judge, Presiding; Argued and submitted May 3, 1982

Before: ELY, SCHROEDER, and NORRIS, Circuit Judges.

SCHROEDER, Circuit Judge.

Patrick Hanigan appeals his conviction on three counts of aiding and abetting a robbery affecting commerce in violation of the Hobbs Act, 18 U.S.C. §1951. His principal challenge is to the district court's jurisdiction to try him

under that Act. He also contends that several evidentiary rulings by the district court were prejudicial, that his prosecution violated the double jeopardy clause of the Constitution, and that the pretrial identification procedure was impermissibly suggestive. We affirm the conviction.

FACTS

On August 18, 1976, three undocumented Mexican aliens entered the United States near Douglas, Arizona. The government's evidence showed that the men had previously entered this country and had found work as unskilled laborers in agricultural enterprises. On this occasion each had again crossed the border in search of agricultural work.

Defendant's brother Thomas found the men on Hanigan land and forced them to accompany him to the family ranch house,

where he was joined by his father, George Hanigan, and the defendant Patrick. Over the course of several hours, the victims were brutally tortued and robbed of their few possessions. They were then told to run for the border; shotguns and pistols were fired at their backs, and two of the three sustained numerous pellet wounds.

All three Hanigans were charged in state court with various crimes, including assault, kidnapping and robbery. George Hanigan died before trial on those charges; Thomas and Patrick were acquitted on all counts. The brothers were later indicted on federal charges on October 10, 1979. The indictment charged them with robberies affecting commerce in violation of the Hobbs Act, 18 U.S.C. §1951.

A first trial on these charges began in June, 1980, but the district court declared a mistrial when the jury

was unable to reach a verdict. The second trial began on January 20, 1981. The district court ordered that separate juries hear the case because the government intended to offer evidence of an incriminating statement by Patrick which was not admissible against Thomas. Thomas was acquitted and Patrick was convicted on all three counts. The district court sentenced Hanigan to three years imprisonment on each count, the sentences to run concurrently.

Hobbs Act Jurisdiction

The Hobbs Act[1/] makes it a federal crime to obstruct, delay, or affect commerce "or the movement of any article or commodity in commerce, by robbery . . ." 18 U.S.C. §1951(a). As defined in the Act, commerce includes "all commerce between any point in a State . . . and any point outside thereof; . . . and all

other commerce over which the United States has jurisdiction." 18 U.S.C. §1951(b)(3).

As a jurisdictional predicate for this prosecution, the government has maintained and the indictment alleged that by crossing into Arizona to search for work, the victims were directly involved in "commerce" and thus fell within the ambit of the statute. Hanigan argues that labor (or laborers) cannot be considered an "article or commodity in commerce" within the meaning of the Hobbs Act. He also urges that if laborers are articles in commerce, undocumented alien laborers are not.

Thus the first issue we must address is whether the movement of laborers into this country is "commerce" within the scope of the Hobbs Act. Hanigan cites the exclusion of labor from the definition

of "commerce" in the antitrust laws. 15 U.S.C. §17.[2/] He argues that the reference in subsection (c) of the Hobbs Act to 15 U.S.C. §17 means that labor is also excluded from Hobbs Act coverage. While 15 U.S.C. §17 provides that "labor . . . is not a commodity or article of commerce," the provision serves merely to exempt the activities of organized labor from the antitrust laws. See Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 803-04 (1945); California State Council of Carpenters v. Associated General Contractors, Inc., 648 F.2d 527, 532-36 (9th Cir. 1981), cert. granted, 102 S. Ct. 998 (1982); Cordova v. Bache & Co., 321 F. Supp. 600, 605-13 (S.D.N.Y. 1970). The Hobbs Act, on the other hand, does not except labor from the definition of "commerce." Subsection (c) of the Hobbs

Act merely makes it clear that the inclusion of labor within the Act does not affect the operation of the antitrust or labor laws.

The Hobbs Act definition of commerce is coextensive with the constitutional definition. The purpose of the Act is "to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." United States v. Bagnariol, 665 F.2d 877, 894 (9th Cir. 1981) (per curiam) (quoting Stirone v. United States, 361 U.S. 212, 215 (1960)), cert. denied, 50 U.S.L.W. 3881 (May 3, 1981) (No. 81-1780); see also United States v. Staszcuk, 517 F.2d 53, 58-59 (7th Cir.) (en banc) ("purpose of the Hobbs Act parallels the central purpose of the Commerce Clause itself"), cert. denied, 423 U.S. 837

(1975). Thus, the only question is whether the movement of laborers may be regulated by Congress under the broad commerce power conferred by the constitution; whether labor also constitutes "commerce" for purposes of the antitrust laws is irrelevant.

The term "commerce" as used in the commerce clause, U.S. Const. art. I, §8, means "intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824). Such intercourse includes the movement of persons. Edwards v. California, 314 U.S. 160, 173-74 (1941). For example, an ordinance requiring collection of a registration fee from all workers impedes the free flow of commerce by creating a burden on the movement of migrant labor.

Service Machine & Shipbuilding Corp. v. Edwards, 617 F.2d 70, 76 (5th Cir. 1980).[3] The movement of laborers across state or national boundaries constitutes commerce within the meaning of the Hobbs Act. Accordingly, the district court correctly instructed the jury that labor or laborers could be articles of commerce.

Hanigan's second attack on jurisdiction is that the victims were not protected by the Hobbs Act because they had entered the United States illegally. He urges that the term "commerce" as used in the statute does not include commerce that Congress has made illegal.[4]

Hanigan points to nothing in the statute or legislative history, however, that would support his argument that "commerce" must be "legal" commerce.[5]

The statute by its terms does not limit "commerce" to the flow of legally condoned articles. Nor could the commerce clause itself mean that an activity to be regulated by Congress must be legally permissible. It is anomalous to maintain that Congress could make undocumented entry into the United States -- the movement of persons -- unlawful, while at the same time maintaining that the same movement of persons is not "commerce over which the United States has jurisdiction" -- the phrase which Congress used in the Hobbs Act. 18 U.S.C. §1951(b)(3). Accordingly, we hold that the movement of undocumented alien laborers across a national boundary into this country is within the constitutional power of Congress to regulate, and thus constitutes commerce within the reach of the Hobbs Act.

Viewing the evidence in the light most favorable to the government, United States v. Friedman, 593 F.2d 109, 115 (9th Cir. 1979), it is uncontrovertable that defendant by robbery interfered with the victims' entry into the country and that the crimes prevented them from working as agricultural laborers in the United States. The government proved both a direct interference with and a potential threat to interstate commerce.[6/]

Evidentiary Rulings

Hanigan challenges several evidentiary rulings made by the district court. Each will be considered in turn. First, Hanigan contends that the district court erroneously excluded from evidence, on grounds of irrelevance, five photographs of a cattle-crossing culvert under a highway near the Hanigan ranch.[7/]

The district court's rulings on the

relevance of evidence will be overturned by this court only for an abuse of discretion. United States v. Burreson, 643 F.2d 1344, 1349 (9th Cir. 1981). "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. Here, no evidence before the jury placed the victims at or near the culvert at any time. The photographs were therefore irrelevant and inadmissible. The district court properly excluded them from evidence.

Hanigan's second assignment of error concerns the trial testimony of Connie Wright, a waitress at a Douglas coffee shop, who had not testified at the first federal trial. She testified at the second trial that shortly after the incident she overheard Hanigan say to his companions in the restaurant, "(W)e fixed those son-of-a-bitching wetbacks." Hani-

gan contends that this evidence should have been excluded because his defense counsel was not notified until mid-trial of Wright's proposed testimony.

Hanigan does not argue that the evidence was inadmissible, but rather that it was uncovered so late that he was "unfairly surprised." The record does not establish any prejudicial surprise. The government gave defense counsel the witness's statement as soon as it became available, and the district court held a preliminary conference at which it ruled that much of Wright's proposed testimony would not be permitted. Moreover, Hanigan's own argument to this court establishes that he vigorously attacked Wright's credibility. Hanigan was also able to offer the testimony of Bonnie Meyers and Ruby Hall, cashiers at the restaurant where Hanigan's alleged

admission occurred. Although Wright stated at trial that she related Hanigan's statement to one of the other women, both testified to the contrary. Since the district court found that the government acted in good faith, and no specific prejudice has been shown, Hanigan has failed to demonstrate error in permitting the testimony of witness Wright.

Finally, Hanigan argues that the district court erred in permitting the government to introduce into evidence empty .357 Magnum shell casings found at the scene of the crime. Foundation for the introduction of the shells had been properly laid by testimony that defendant fired a revolver during the robbery and that he owned a .357 Magnum revolver. The evidence was therefore relevant and admissible, and the contention that it

should have been excluded is without merit.

Double Jeopardy

Prior to the first federal trial, the defendants moved to dismiss the indictment on several grounds, including double jeopardy. After the district court denied this motion, defendants appealed to this court, which summarily affirmed the district court's ruling that they were not being subjected to double jeopardy, citing Abbate v. United States, 359 U.S. 187 (1959) (successive prosecutions by different sovereigns do not violate double jeopardy), and United States v. Solano, 605 F.2d 1141 (9th Cir. 1979)(same), cert. denied, 444 U.S. 1020 (1980). Hanigan v. United States, No. 79-1823 (9th Cir. Jan. 29, 1980), cert. denied, 101 S. Ct. 1517 (1981). Hanigan offers no basis for departing from that

result now.

Hanigan's argument that the government was equitably estopped to try him following the district court's declaration of a mistrial is also without merit. Hanigan has not pointed to any material misstatement made by the government upon which he reasonably relied to his detriment. See, e.g., Broussard v. Patton, 466 F.2d 816, 819-20 (9th Cir. 1972), cert. denied, 410 U.S. 942 (1973). Moreover, Hanigan does not contend that the district court abused its discretion in declaring the mistrial. See United States v. Cawley, 630 F.2d 1345, 1349 (9th Cir. 1980); United States v. Berniker, 439 F.2d 686, 687 (9th Cir.), cert. denied, 404 U.S. 938 (1971).

Pretrial Photo Identification

All three victims identified Thomas and Patrick Hanigan at trial as the per-

sons who robbed and tortured them. Additionally, over the objection of Patrick Hanigan's counsel, the district court permitted testimony that two of the victims positively identified the defendants the day after the incident, while the other victim made a tentative identification. Each victim picked out pictures of the brothers from high school yearbooks. Hanigan contends that this procedure was impermissibly suggestive because his name appears under his picture in the 1972 yearbook, and the victims (who were illiterate) might have learned the name "Hanigan" from the sign located in front of the ranch where they were taken during the crime.

A photographic procedure that is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," Simmons v. United States, 390 U.S. 377, 384 (1968),

violates the defendant's right to due process. Identification procedures that emphasize a single individual's photograph may be unduly suggestive. Id. at 383. However, because "reliability is the linchpin in determining the admissibility of identification testimony," Manson v. Brathwaite, 432 U.S. 98, 114 (1977), a suggestive identification procedure will not be held to violate due process if sufficient indicia of reliability are present. Id. at 106. Five factors are to be considered in determining whether an out-of-court identification is reliable:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at

the confrontation, and the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200 (1972); Green v. Loggins, 614 F.2d 219, 223 (9th Cir. 1980). After examining the five factors, a court should weigh "their existence and extent '(a)gainst . . . the corrupting effect of the suggestive identification itself.'" United States v. Field, 625 F.2d 862, 866 (9th Cir. 1980) (quoting Manson, supra, 432 U.S. at 114).

Sufficient indicia of reliability are present here. The victims were held by their assailants for several hours during the middle of the day; the identification in question was made the following day; and two of the victims were positive in their identifications. Assuming for the purpose of argument the procedure used was suggestive, the reliability of the identification was sufficiently

indicated. This conclusion is supported by weighing the five factors against the corrupting effect of any suggestiveness. It can be said that the identification was "the product of observations at the time of the crime" rather than the result of "impressions made during the suggestive pretrial photographic identification process." United States v. Field, supra, 625 F.2d at 866.

Hanigan's other arguments to the effect that he was denied due process throughout the proceedings do not merit discussion in this opinion and are rejected.

Affirmed.

FOOTNOTES

1/ In relevant part, the Act provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce,

by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this action shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section --

(1) The term "robbery" means the unlawful taking or obtaining or personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, . . . or of anyone in his company at the time of the taking or obtaining.

. . .

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect Section 17 of Title 15, Sections 52,

101-115, 151-166 of Title 29 or section 151-188 of Title 45.

2/ "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

3/ Cf. United States v. Pearson, 508 F.2d 595 (5th Cir.), cert. denied, 423 U.S. 845 (1975) (jurisdiction upheld in Hobbs Act conspiracy prosecution where evidence showed that the victim hotel had a large number of out-of-state visitors).

4/ For an alien to enter this country without inspection or to work in the United States without proper labor certification was declared illegal by Congress in the 1952 Immigration and Nationality Act. See 8 U.S.C. §§1251(a)(2), 1182(a)(14). Similarly, the Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, 88 Stat. 1656 (codified in scattered sections of 7 U.S.C.), criminalized the knowing employment of aliens neither lawfully admitted for permanent residence nor authorized by the Attorney General to accept employment in

this country. 7 U.S.C. §2045(f).

5/ The Seventh Circuit left open a related question in a case involving a corporate victim of an extortionate act. United States v. Blakey, 607 F.2d 779, 783 (7th Cir. 1979). Finding that the business in Blakey was a mixed legal and illegal business, the court stated that it was not considering whether the Hobbs Act applies to wholly illegal businesses, and held that the Hobbs Act's coverage does extend to mixed legal/illegal businesses.

6/ Hanigan also argues that the government was required to prove an actual effect on commerce and that the jury was improperly instructed that a "potential" effect was sufficient to convict. All of the circuits which have considered the question have ruled that proof of a probable or potential effect is sufficient in attempt or conspiracy cases. United States v. Jannotti, 673 F.2d 578, 592 (3d Cir.)(enbanc), petition for cert. filed, 50 U.S.L.W. 3841 (April 12, 1982) (No. 81-1899); United States v. Glynn, 627 F.2d 39, 41 (7th Cir. 1980); United States v. DiGregorio, 605 F.2d 1184, 1190 (1st Cir.), cert. denied, 444 U.S. 937 (1979). This rule derives from United States v. Staszcuk, 517 F.2d 53, 59-60 (7th Cir.)(en banc), cert. denied, 423 U.S. 837 (1975), which involved a substantive Hobbs Act conviction. Writing for the majority of the court, Justice (then Judge) Stevens concluded that "the cases which uniformly hold that a threatened effect on interstate commerce is sufficient to bring the statute into play notwithstanding the absence of

any actual effect, correctly interpret the congressional purpose." Id. at 59 (footnote omitted). Glynn has been cited with approval by this circuit, which follows the rule of the Seventh Circuit. United States v. Bagnariol, supra, 665 F.2d at 894.

In any event, we need not decide what sort of attenuated or potential effect on commerce is required to satisfy the jurisdictional aspect of the Hobbs Act as the government demonstrated an actual effect in this case.

7/ The court did permit Hanigan to introduce 19 photographs of the ranch and the field where the victims claimed to have been tortured and robbed.

FILED Sep 22 1982
Phillip B. Winberry
Clerk U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 81-1262
	)	
vs.	)	
	)	ORDER
PATRICK W. HANIGAN,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: ELY, SCHROEDER, and NORRIS,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED Oct. 10 2:13 PM '79

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK W. HANIGAN and THOMAS H. HANIGAN, Defendants.	CR-79-206-TUC INDICTMENT Violations: 18 U.S.C. §1951 18 U.S.C. §2 (Robbery affecting commerce; Aiding and abetting)

THE GRAND JURY CHARGES:

COUNT ONE

(1) That at all times material herein, Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata, residents and citizens of Mexico, were travelling from Mexico toward Elfrieda, Arizona, in search of work at agricultural business in the State of Arizona.

(2) That at all times material herein the agricultural businesses at which Manuel Garcia Loya, Eleazar Ruelas Zavala and

Bernabe Herrera Mata were seeking employment received and sold goods shipped in interstate commerce and used labor moving in interstate and foreign commerce.

(3) That, on or about August 18, 1976, in Cochise County, in the District of Arizona, the defendants, PATRICK W. HANIGAN and THOMAS H. HANIGAN, did unlawfully, knowingly and willfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by the robbery of Manuel Garcia Loya, as the terms "commerce" and "robbery" are defined in Section 1951 of Title 18, United States Code, and committed physical violence to the persons and property of Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata in furtherance of a purpose to commit robbery of Manuel Garcia Loya, that is to say, the defendants did unlawfully take and obtain personal property in the form of United States currency in the approximate

amount of thirty-six dollars and clothing from the person and in the presence of Manuel Garcia Loya, against his will, by means of the actual and threatened use of force, violence and fear of injury to the persons and property of Manuel Garcia Loya and of his companions Eleazar Ruelas Zavala and Bernabe Herrera Mata including, but not limited to, physical restraint with ropes, the use of knives to cut and remove their clothing and hair, threats to burn them with a heated metal rod, and the brandishing and shooting of firearms.

All in violation of 18 U.S.C. §§ 1951 and 2.

COUNT TWO

(1) That at all times material herein, Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata, residents and citizens of Mexico, were travelling from Mexico toward Elfrieda, Arizona, in search of work at agricultural businesses in the State

of Arizona.

(2) That at all times material herein the agricultural businesses at which Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata were seeking employment received and sold goods shipped in interstate commerce and used labor moving in interstate and foreign commerce.

(3) That, on or about August 18, 1976, in Cochise County, in the District of Arizona, the defendants, PATRICK W. HANIGAN and THOMAS H. HANIGAN, did unlawfully, knowingly and wilfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by the robbery of Eleazar Ruelas Zavala, as the terms "commerce" and "robbery" are defined in Section 1951 of Title 18, United States Code, and committed physical violence to the persons and property of Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata in furtherance of

a purpose to commit robbery of Eleazar Ruelas Zavala, that is to say, the defendants did unlawfully take and obtain personal property in the form of a key ring and clothing from the parson and in the presence of Eleazar Ruelas Zavala, against his will, by means of the actual and threatened use of force, violence and fear of injury to the persons and property of Eleazar Ruelas Zavala and of his companions Bernabe Herrera Mata and Manuel Garcia Loya including, but not limited to, physical restraint with ropes, the use of knives to cut and remove their clothing and hair, threats to burn them with a heated metal rod, and the brandishing and shooting of firearms.

All in violation of 18 U.S.C. §§ 1951 and 2.

COUNT THREE

(1) That at all times material herein, Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata, residents and citizens of Mexico, were travelling from Mexico toward

Elfrida, Arizona, in search of work at agricultural businesses in the State of Arizona.

(2) That at all times material herein the agricultural businesses at which Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata were seeking employment received and sold goods shipped in interstate commerce and used labor moving in interstate and foreign commerce.

(3) That, on or about August 18, 1976, in Cochise County, in the District of Arizona, the defendants, PATRICK W. HANIGAN and THOMAS H. HANIGAN, did unlawfully, knowingly and willfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by the robbery of Bernabe Herrera Mata, as the terms "commerce" and "robbery" are defined in Section 1951 of Title 18, United States Code, and committed physical violence to the persons and property of Manuel Garcia Loya, Eleazar Ruelas Zavala

and Bernabe Herrera Mata in furtherance of a purpose to commit robbery of Bernabe Herrera Mata, that is to say, the defendants did unlawfully take and obtain personal property in the form of United States currency in the approximate amount of one dollar and clothing from the person and in the presence of Bernabe Herrera Mata, against his will, by means of the actual and threatened use of force, violence and fear of injury to the persons and property of Bernabe Herrera Mata and of his companions Manuel Garcia Loya and Eleazar Ruelas Zavala including, but not limited to, physical restraint with ropes, the use of knives to cut and remove their clothing and hair, threats to burn them with a heated metal rod, and the brandishing and shooting of firearms.

All in violation of 18 U.S.C. §§ 1951 and 2.

A TRUE BILL

/s/ Kourt D. Wofford
FOREMAN

/s/ Michael D. Hawkins
MICHAEL D. HAWKINS
United States Attorney
District of Arizona

Supreme Court, U.S.
FILED
JAN 12 1983
ALEXANDER L. STEVAS
Clerk

No. 82-892

In the Supreme Court of the United States

OCTOBER TERM, 1982

PATRICK W. HANIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-892

PATRICK W. HANIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review[1] of his conviction in the United States District Court for the District of Arizona for violating the Hobbs Act, 18 U.S.C. 1951, by beating, torturing, robbing, and shooting three Mexicans who had entered Arizona from Mexico to work as farm laborers. The Hobbs Act makes it a federal crime to commit a robbery that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce"

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[1]The petition in this case was not timely filed and should be denied on that ground. The court of appeals denied rehearing on September 22, 1982 (see Pet. 3), but the petition was not filed until November 29, 1982. See Sup. Ct. R. 20.1. Contrary to petitioner's apparent belief (see Pet. 4), the order of the court of appeals recalling issuance of its mandate did not extend the time within which to file the petition.

(18 U.S.C. 1951(a)).[2] "Commerce" is defined by statute to include "all commerce between any point in a State * * * and any point outside thereof * * *; and all other commerce over which the United States has jurisdiction" (18 U.S.C. 1951(b)(3)). Petitioner's argument that his robbery did not affect "commerce" has no merit,[3] and there is no reason for further review of this case.

1. The evidence showed that the three victims, citizens and residents of Mexico, crossed the border between Mexico and Arizona to obtain work as agricultural laborers. They had previously crossed the border for the same purpose and had found such employment (Pet. App. B2). The

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[2]18 U.S.C. 1951 provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section [commits an offense] * * *.

(b) As used in this section —

* * * * *

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or section 151-188 of Title 45.

[3]We are unable to determine from the petition whether petitioner is attacking the sufficiency of the indictment, as he did in the district court (Pet. App. A), or complaining of the jury instructions (Pet. App. B9) or attacking the sufficiency of the evidence to show a connection between the robbery and "commerce" (Pet. 11, 13).

evidence also showed that the victims would have found farm employment had they not been prevented from reaching their destination by petitioner and his accomplices (Tr. 2038-2046, 2064-2071, 3034).

Petitioner's brother found the three victims on land owned by the Hanigan family and abducted them at gunpoint. Petitioner and his father joined the brother, and over the course of several hours, the three Hanigans brutally tortured the Mexicans and robbed them of their few possessions. The Hanigans then forced the Mexicans to run back across the border to Mexico and shot at them with shotguns. Two of the Mexicans sustained numerous pellet wounds (Pet. App. B 2-3).

Petitioner was tried by a jury in federal court on an indictment charging that at the time of the crime the victims were travelling from Mexico to Elfrieda, Arizona, in search of employment and that the robbery had affected commerce (Pet. App. B5, D1).[4] The jury found petitioner guilty, and he was sentenced to three concurrent terms of three years' imprisonment.[5]

On appeal, petitioner contended that "commerce" under the Hobbs Act does not include the travel of laborers and, alternatively, that the Act does not prohibit interference

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[4]Petitioner was previously charged with and acquitted of various state offenses based upon the same events.

[5]Petitioner has sought certiorari twice before in prior proceedings in this case; both petitions were denied. In the first petition, *Hanigan* v. *United States*, 446 U.S. 953 (1980), he contended that his prior state acquittal barred federal prosecution. In the second, *Hanigan* v. *United States*, 450 U.S. 982 (1981), he argued that he was entitled to appellate review of the sufficiency of the evidence at his first federal trial, which ended in a mistrial when the jury was unable to reach a verdict. Petitioner's brother, indicted by the same federal indictment, was tried before a separate jury and was acquitted.

with the illegal entry of undocumented laborers. The court of appeals held, however, that the definition of "commerce" in the Act is "coextensive with the constitutional definition" (Pet. App. B7) and that the movement of laborers across state or national boundaries is "commerce" in the constitutional sense (*id.* at B8 to B9).[6] The court also observed (*id.* at B10) that nothing in the language or legislative history of the statute suggests that Congress meant to limit the statute to robberies or extortions that affect lawful commerce. Since the movement of alien laborers across national boundaries is within the power of Congress to regulate, the court reasoned that such movement constitutes "commerce over which the United States has jurisdiction" and is accordingly within the reach of the statute (*id.* at B10). Because petitioner's violent actions prevented the victims from entering the United States and obtaining employment, the court held (*ibid.*) that the government had proved "both a direct interference with and a potential threat to interstate commerce".

2. The court of appeals properly rejected petitioner's arguments that the movement of labor across a state line is not "commerce over which the United States has jurisdiction" and that the Hobbs Act does not reach illegal commerce (Pet. App. B5). Relying on this Court's interpretation of the Commerce Clause in *Edwards* v. *California*, 314 U.S. 160, 173-174 (1941), and this Court's recognition that the Hobbs Act "manifest[s] * * * a purpose to use all the constitutional power Congress has to punish interference with interstate commerce" (*Stirone* v. *United States*, 361 U.S. 212, 215 (1960); *United States* v. *Culbert*, 435 U.S. 371, 373 (1978)), the court below correctly held that the movement of laborers across state or national boundaries may constitute "commerce" within the meaning of the

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[6]The court of appeals' opinion is reported at 681 F.2d 1127.

Commerce Clause and the Hobbs Act. See *Service Machine & Shipbuilding Corp.* v. *Edwards*, 617 F.2d 70, 76 (5th Cir. 1980). Petitioner cites no authority to the contrary.[7]

Petitioner maintains (see Pet. 7, 13) that "commerce" was not affected by the robbery because the business of the victims' prospective employer was not harmed. The relevent commerce, however, is the international travel of the victims. As the court of appeals recognized (Pet. Ap. B10), petitioner's robbery and torture of the three Mexicans indubitably interfered with their movement across a national boundary to sell their services as laborers and thus affected commerce.

Petitioner contends (Pet. 9-10) that the power conferred upon Congress to regulate the entry of aliens into the country (Article 1, Section 8, Clause 3) supports his argument that the Commerce Clause does not reach the entry of such persons. However, petitioner cites no authority for the proposition that the powers conferred by the Immigration and Naturalization Clause and the power "[t]o regulate Commerce with foreign Nations * * *" under the Commerce Clause do not overlap.

Petitioner argues (see Pet. 15-16) that application of the Hobbs Act to the "commerce" in this case is an undue expansion of federal jurisdiction. But, as this Court explained in *United States* v. *Culbert, supra*, 435 U.S. at 379-380, when Congress enacted the Hobbs Act it "intended

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[7]The court of appeals was also correct in rejecting petitioner's argument, apparently not pursued here, that "commerce" must be lawful to be within the ambit of the Hobbs Act (Pet. App. B9-10). Nothing in the Hobbs Act states or implies that the statute applies only where the "commerce" affected is lawful or where the articles involved entered the United States legally. See *United States* v. *Blakey*, 607 F.2d 779, 783 (7th Cir. 1979); *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975). Cf. *United States* v. *Turkette*, 452 U.S. 576, 587 (1981).

to define as a federal crime conduct that it knew was punishable under state law" and "intended to make criminal all conduct within the reach of the statutory language."[8]

3. The decision below does not conflict with those of other courts of appeals, as petitioner contends (Pet. 6, 15, 18-19). The cases upon which petitioner relies — *United States* v. *Mattson*, 671 F.2d 1020 (7th Cir. 1982), and *United States* v. *Boulahanis*, 677 F.2d 586 (7th Cir. 1982), cert. denied No. 82-263 (Nov. 15, 1982) — did not address the question whether the movement of laborers across state lines may constitute "commerce." *Mattson* held that extortion from a person whose employer was engaged in commerce did not violate the Hobbs Act where the extortion had no effect on the employer's interstate purchases. The victim in *Mattson* was an individual who "had no connection with interstate commerce at all, but whose only connection was with a business which was engaged in interstate commerce" (671 F.2d at 1025). In *Boulahanis*, a Hobbs Act conviction was affirmed and *Mattson* was distinguished because the victim regularly made small purchases from out of state. Both *Mattson* and *Boulahanis* involved acts that had only an indirect effect on commerce (extortion resulting in a

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[8]Petitioner contends (Pet. 16-18) that he was denied due process because his conviction was based upon a "new, expansive interpretation of the Hobbs Act" (Pet. 16) that could not have been foreseen. This argument lacks merit. Petitioner's conduct fell squarely within the plain meaning of the statutory language, and he cites no authority upon which he might have reasonably relied in reaching a contrary conclusion. Moreover, it is absurd to argue that petitioner was relying upon a restrictive interpretation of the statutory language or the Commerce Clause when he beat, tortured, robbed, and shot the victims encountered on his family's land. Petitioner's conduct, which anyone would have known was illegal, is therefore not analogous to that in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), upon which he relies (Pet. 17-18). *Bouie* concerned the retroactive application of a new interpretation of a state trespass statute to a sit-in at a racially segregated restaurant.

diminished ability to buy or sell across state lines). The *Mattson* court made clear (671 F.2d at 1023-1024) that it was not overruling its prior decisions upholding application of the Hobbs Act to extortion or robbery directly interfering with the victim's activities in interstate commerce as did the robbery here. See, e.g., United States v. *Staszcuk*, 517 F.2d 53 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1983

DOJ-1983-01